Supreme Court, U
FILED
APR - 3 2015
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Nos. 14-556, 14-562, 14-571, 14-574

In The
Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
WILLIAM EDWARD "BILL" HASLAM, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICHARD SNYDER, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, in his official capacity as Governor of Kentucky, *Respondent*.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING RESPONDENTS

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April 2015

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and the free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), *Fisher v. University of Texas at Austin, et al.*, 133 S. Ct. 2411 (2013), *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009).

SLF has an abiding interest in protecting and preserving those principles fundamental to America's dual system of government – state sovereignty and separation of powers. Defining marriage has historically been left to the States as an exercise of state sovereign power. The States serve as laboratories of

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amicus curiae*'s intention to file this brief. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, their members, and their counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

social policy, allowing the People to be directly involved in the democratic process.

SUMMARY OF ARGUMENT

The Court is tasked with passing upon the constitutionality of the state laws, enacted by both the various state legislatures and through direct democratic process, that codified the traditional definition of marriage (one man and one woman). In today's society, it is hard to find issues of social policy that invoke stronger emotions and viewpoints than marriage and sexual orientation. However, when one strips away the emotion-fueled discourse surrounding this case and others like it, the true legal issue reveals itself. As Justice Scalia so aptly put it in *United States v. Windsor*, "[t]his is a case about power." 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting). It is about the power of the States to establish social policy within their borders, the power of the People of those States to govern themselves, and the power of the Judiciary to pass upon the constitutionality of the results of those acts of governance. But even more, it is a case about the founding principles that those powers imbue – state sovereignty and separation of powers – and the judicial restraint exercised by this Court when invoking its power to declare a law void.

In 1798, Justice Iredell cautioned that "the authority to declare [laws] void is of a delicate and awful nature" and that "the Court will never resort to

that authority, but in a clear and urgent case." *Calder v. Bull*, 3 U.S. 386, 399 (1798). Throughout history the Court has heeded that warning. This Court's jurisprudence demands the highest level of judicial restraint when recognizing a new fundamental right or a new suspect classification. The enactment of the laws and adoption of the state constitutional amendments at issue constitute exercises of the States' sovereign authority. Our federal system allows for the States to serve as laboratories of social policy, especially in the area of domestic law, and for the People to have direct involvement in the democratic process.

ARGUMENT

I. This Court and the Framers caution against vetoes of legislative choices.

"[I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect on its own notions of what is wise or politic." *Furman v. Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting). For the duty to review legislative choices is "the gravest and most delicate duty that this Court is called on to perform." *Furman*, 408 U.S. at 431 (quoting *Blodgett v. Holden*, 275 U.S. 142 (1927) (Holmes, J., separate opinion)). The Framers never expected, as the Anti-Federalists alleged, that the courts would usurp legislative power, or, as Alexander Hamilton phrased it, "on the pretense of repugnancy . . substitute their own pleasure to the

constitutional intentions of the legislature." Kenneth P. Miller, *Direct Democracy and the Courts* 83 (Cambridge Univ. Press 2009) (quoting The Federalist No. 78, at 467 (Alexander Hamilton) (C. Rossiter ed. 1961). As such, the Court is "bound down by strict rules and precedents which serve to define and point out [its] duty in every case that comes before [it]." *Id.* Ignoring the delicate nature of this duty, Petitioners ask this Court to review the state laws defining marriage as traditional marriage (one man and one woman) and to find those laws unconstitutional under a variety of theories including the Due Process Clause and the Equal Protection Clause. U.S. Const. amend. XIV.

The Court has never recognized a fundamental right to same-sex marriage or applied a level of heightened scrutiny to classifications based on sexual orientation. When, like here, the state laws neither encroach on a fundamental right nor implicate a suspect classification, the Court applies rational basis review – in other words, the Court will ask whether the law has some "plausible" basis. *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17-18 (1992). The application of rational basis review commonly results in favor of constitutionality. The Sixth Circuit adhered to this Court's precedent and applied rational basis review. It found several plausible bases for the state laws at issue, exercised its judicial restraint and declined to find the laws unconstitutional. *DeBoer v. Snyder*, 772 F.3d 388, 405-08 (6th Cir. 2014).

Just as it is indisputable that the Court has the power to exercise "a supervisory veto over the wisdom and value of legislative policies," *Griswold v. Connecticut*, 381 U.S. 479, 512 (1965) (Black, J., dissenting), it is also indisputable that applying this Court's precedent, to exercise such a veto here, the Court must recognize a fundamental right to same-sex marriage or find sexual orientation to be a suspect classification warranting a higher level of scrutiny.[2] The Court would be recognizing a social construct that has existed for just over one decade and disregarding the centuries old definition of marriage codified in the state laws at issue. "[W]ithout some more convincing evidence that the [laws'] principal purpose was to codify malice, and that [they] furthered *no* legitimate government interest" the Court would "tar the political branches with the brush of bigotry." *Windsor*, 133 S. Ct. at 2696 (Roberts, J., concurring).

II. When the States engage in customary exercises of sovereign power, judicial restraint is appropriate.

"Federalism was the unique contribution of the Framers to political science and political theory."

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[2] If the Court finds that sexual orientation is a suspect classification, in effect, it would be finding that laws regarding sexual orientation are equal to or worthy of a higher level of scrutiny than laws regarding gender. *See Nguyen v. INS*, 533 U.S. 53, 61 (2001).

United States v. Lopez, 514 U.S. 549, 574 (1995). Under the federal system created by the Framers, "the States possess sovereignty concurrent with that of the Federal Government, subject only to those limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 456 (1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, at 458 (1990)). In The Federalist No. 45, James Madison counseled that the powers "which are to remain to the State governments are numerous and indefinite." The Federalist No. 45, at 292-93 (James Madison) (C. Rossiter ed. 1961). "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State." *Id.* That the States were left free to exercise their powers, have their own governments and were "endowed with all the functions essential to [a] separate and independent existence" was no accident. *See Gregory*, 501 U.S. at 456 (quoting *Texas v. White*, 74 U.S. 700 (1869)). Rather, the comity inherent in this system "secures to citizens the liberties that derive from the diffusion of sovereign power." *Lopez*, 514 U.S. at 576 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

As Justice O'Connor explained in *Gregory v. Ashcroft*, the federalist structure "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes;

it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458. This idea that state sovereignty allows the People to be involved through their state governments, while key to understanding the true reasons for our system of dual sovereignty, is neither new nor novel, but it is commonly forgotten – even by the Framers at times. James Madison "reminded" his fellow countrymen that "the ultimate authority, wherever the derivative may be found, resided in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other." The Federalist No. 46, at 291 (James Madison) (C. Rossiter ed. 1961). Petitioners appear to have forgotten these basic principles of state sovereignty.

Judicial restraint is appropriate where the States have engaged in "a proper exercise of [their] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor*, 133 S. Ct. at 2692. In this case, the Court is being asked to leapfrog over the States' power to serve as laboratories for social and economic policy through the People's exercise of the right to be involved in the governing process.

A. America's federalist system provides that the States serve as laboratories of democracy for social policy.

In fulfilling their constitutional obligation to govern and in exercising their constitutional powers concerning the lives, liberties, and properties of the People, the States may act as "insulated chambers" that "mak[e] social experiments that an important part of the community desires." *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). Or, put another way, States may serve as "laboratories" for the experimentation and development of new social, economic and political ideas. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In 1930, then Professor Felix Frankfurter, began to popularize Holmes' statements in a critique of what he viewed as overzealous judicial enforcement of substantive due process against the States: "The very notion of our federalism calls for the free play of local diversity in dealing with local problems. . . . [J]udicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error. ." Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 Vand. L. Rev. 1229, 1233 (1994) (quoting Felix Frankfurter, *The Public and Its Government* 49-50 (Yale Univ. Press 1930)).

Building upon the sentiments of his protégé, Justice Brandeis formalized the "laboratory" metaphor in his *New State* dissent. He observed: "To stay

experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting). As Justice Rehnquist noted, this "statement has been cited more than once in subsequent majority opinions of the Court." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 217 (1994) (Rehnquist, J., dissenting) (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980)).

Over the past 35 years, the Court ardently embraced the principle that the States serve as laboratories for social (and economic) policy. *See Oregon v. Ice*, 555 U.S. 160, 171 (2009); *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring); *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); *W. Lynn Creamery*, 512 U.S. at 217 (Rehnquist, J., dissenting); *Gregory*, 501 U.S. at 458; *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring); *Fed. Energy Regulatory Comm'n (FERC) v. Mississippi*, 456 U.S. 742, 787-88 (1982) (O'Connor, J., concurring in the judgment and dissenting in part). In *FERC*, Justice O'Connor noted that "state innovation is no myth." *FERC*, 456 U.S. at 788-89. She explained that social, economic and political ideas such as permitting women to vote, unemployment insurance, minimum wage laws, no-fault

automobile insurance and even environmental protection arose out of States' experimentation and at times, decades of debate. *Id.* Justice O'Connor heeded that encroachment on state sovereignty in these areas "will retard this creative experimentation." *Id.* at 789.

Most recently, in *Windsor*, this Court explained that the "regulation of domestic relations . is an area that has long been regarded as a virtually exclusive province of the States." 133 S. Ct. at 2691.[3] "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *Id.* (citing *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)); *see also Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930). Throughout history, the Court has deferred to the States and declined to intervene in the area of domestic relations, allowing the States to serve as laboratories for laws defining marriage which are the subject of statewide discourse and deliberations. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12-13 (2004) (explaining that the Court's deference to the State laws in domestic relations is so strong that it has recognized "a domestic relations exception that

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[3] *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring) (federal courts will not hear divorce custody cases); *Moore v. Sims*, 442 U.S. 415, 429 (1979); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 459-61 (1945); *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878).

divests the federal courts of power to issue divorce, alimony, and child custody decrees" and has acknowledged that courts should likely decline to hear cases involving "elements of the domestic relationship") (internal citations and punctuation omitted).

B. It is a cornerstone of American democracy that the People be left to robustly debate social issues.

"In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government." *FERC*, 456 U.S. at 789 (O'Connor, J., concurring in the judgment and dissenting in part). As James Madison stated, "the ultimate authority . . . reside[s] in the people alone." The Federalist No. 46, at 291 (James Madison) (C. Rossiter ed. 1961). The exercise of this authority through participation in local government, especially on issues that are the subject of robust democratic debate, is "a cornerstone of American democracy." *FERC*, 456 U.S. at 789. "It gives [the People] a voice in decisions that will affect the future development of their own community." *James v. Valtierra*, 402 U.S. 137, 143 (1971).

There are several ways citizens exercise the authority Madison referenced, two of which are central to this case – through voting on amendments to State Constitutions and through their duly elected State representatives. With respect to direct voting, 31 states have passed constitutional amendments

that define marriage as traditional marriage (one man and one woman), effectively limiting or banning same-sex marriage.[4] While the political process and precise mechanisms for adoption of those constitutional amendments differ in each State, at some point in the process, the citizens spoke through their votes in 31 states. That the subject of these constitutional amendments and laws is the subject of robust debate cautions against judicial review. *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (noting that "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate"). For, "[i]f we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems." *FERC*, 456 U.S. at 789.

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[4] In Michigan, the constitutional amendment passed with 59% of voter support. *See* http://miboecfr.nicusa.com/election/results/04GEN/90000002.html (last visited Apr. 1, 2015). In Ohio, the constitutional amendment passed with 62% of voter support. *See* http://ballotpedia.org/Ohio_Issue_1,_the_Marriage_Amendment_(2004) (last visited Apr. 1, 2015). In Kentucky, the constitutional amendment passed with 75% of voter support. *See* http://ballotpedia.org/Kentucky_Marriage_Amendment_(2004) (last visited Apr. 1, 2015). And, in Tennessee, the constitutional amendment passed with 81% of voter support. *See* http://ballotpedia.org/Tennessee_Same-Sex_Marriage_Ban,_Amendment_1_(2006) (last visited Apr. 1, 2015).

"The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting). For, "[f]reedom resides first in the people without need of a grant from government." *Id.*

CONCLUSION

For the foregoing reasons Southeastern Legal Foundation respectfully submits this *amicus curiae* brief.

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April 2015